No. 15,873

United States Court of Appeals

For the Ninth Circuit

UNITED STATES,
Appellant,

vs.

E. B. HOUGHAM, et al.,
Appellees.

On Appeal from the United States District Court for the Southern District of California, Northern Division.

REPLY TO PETITION FOR REHEARING.

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To the Honorable Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

We respectfully suggest that the Petition for Rehearing of Appellant should be denied. The opinion is not based upon a ground which was neither briefed nor argued by either party; on the contrary, the position of the Government is argued on page 15 of its brief and again on page 20, and the Court adopted the theory of Appellant in its opinion, where the Court states:

> "The amount of recovery prayed for had no effect upon the substance of the claim. If a cause of action was stated, based upon the statute, the

> amount of recovery would be based upon the proof.
>
> and
>
> "At the end of the trial the Government would be entitled to that which the Court found was established by the evidence."

Appellees argued the matter from the premise that an election was improper and not applicable in its brief on pages 23 through 26 inclusive, and pointed out that under the allegations of the First Amended Complaint, and under the proof submitted at the trial, there was no proof of, "Twice the consideration agreed to be given by such person to the United States."

The opinion supports the trial Court's version that the evidence offered did not support a recovery under the second alternative of the Act. It follows that the major premise and the entire Petition must fall, because the Court is making no selection or election of remedies to the exclusion of the Government. The Court has merely found that the Government has failed to present a case which would justify a recovery under the second alternative.

It is submitted that the Supreme Court's denial of certiorari in the case of *Koller v. U. S.* in no way effects the reasoning of the Court that a choice of remedies willy nilly, regardless of the evidence, would provide a criminal penalty. The comments of the Court in this regard are not germane to the basis of the opinion which rejected the statute of limitations argument.

The opinion does not state, as the Petition suggests, that the conclusion of the Court was in any way effected by the fact that no actual damages were proven, nor does it follow that to admit some theoretical rather than monetary damage, would in any way change the result. The reasoning of the Government on page 9 of its Petition is entirely fallacious for the Surplus Properties Act allows sales, not only for cash, but on credit, on bids, on contract, and on numerous situations where the transaction at some time or stage had an executory covenant where a sum of money was agreed to be paid. At any rate, had Congress intended to achieve the result sought by the Government, it could have done so by appropriate language.

Dated, Bakersfield, California,
May 6, 1959.

Respectfully submitted,
CONRON, HEARD & JAMES,
By CALVIN H. CONRON, JR.,
Attorneys for Appellees.